

HIGH COURT OF CHHATTISGARH, BILASPUR**WP No.139 of 2004**

1. Ayukt, Nagar Palik Nigam, Raipur (CG)
2. K.R. Patel, Sub Fire Station Officer, Raipur (CG)

---- Petitioners

Versus

1. Presiding Officer, Labour Court, Raipur (CG)
2. Mahamantri, Chhattisgarh Nagar Palika Nigam Karmachari Sangh, Jawahar Nagar, Raipur (CG)
3. Chhanuram Sinha, S/o Shri Pandoram Sinha, Aged about 55 years, Fire Bridge Officer, Nagar Nigam, Raipur

---- Respondents

For Petitioners	:	Mr.Kashif Shakeel, Advocate
For Respondent No.3	:	Mr.Hari Agrawal, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal**Order on Board**05/02/2018

1. Municipal Corporation, Raipur invited applications for appointment on the post of Sub-Fire Officer, in which petitioner No.2 and respondent No.3 applied along with other candidates and ultimately petitioner No.2 was granted appointment on the post of Sub-Fire Officer, which was not challenged by the petitioner in Court of law by filing suitable application/petition and has become final. Thereafter, on 27.4.1987, a representation was made by respondent No.3 claiming the post of Sub-Fire Officer and ultimately, at his instance, the matter was referred to the Labour Court for adjudication. The Labour Court by the impugned order dated 13.10.2003 directed the Municipal Corporation to post respondent No.3 on the post of Sub-Fire Officer by way of promotion and further directed to pay the difference amount of pay of Sub-Fire Officer w.e.f. November, 1980. Feeling aggrieved against the said order, the petitioners have filed this writ petition.

2. Mr.Kasif Shakeel, learned counsel for the petitioners, would submit that post of Sub-Fire Officer is a direct recruitment post in which respondent No.3 has also appeared, but was not selected as he was holding the post of Fireman and next promotional post of Fireman is Leading Fireman and then post of Sub-Fire Officer for promotion, therefore, the impugned order is contrary to law and the Labour Court is not having jurisdiction to direct for grant of promotion, as such, the impugned order of the Labour Court deserves to be set aside.
3. On the other hand, Mr.Hari Agrawal, learned counsel for respondent No.3, would support the impugned order.
4. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also gone through the records with utmost circumspection.
5. The question for consideration would be whether such a direction can be given by the Labour Court to directly promote without leaving discretion on the part of the employer.
6. In a Constitution Bench decision of the Supreme Court in **Management of Brooke Bond India (P) Ltd.** (supra), the Constitution Bench has held that promotion is a managerial function and has to be left mainly to the discretion of the management which has to make the choice from amongst the employees to promotion, but in appropriate case, it may be directed for promotion where the person superseded has been so superseded on account of mala fides or victimisation after recording a finding to that effect.

7. In the matter of **The State of Mysore and another v. Syed Mahmood and others**¹, the Supreme Court has held that the High Court can issue a writ to the State Government compelling it to perform its duty and to reconsider their case on merits, but the High Court cannot issue a writ directing the State Government to promote with retrospective effect, it has to give opportunity to the State Government in the first instance to consider their fitness for promotion.
8. Thereafter, in the matter of **State of Mysore and another v. P.N. Nanjundiah and another**², the Supreme Court while following the decision of **Syed Mahmood's** case (supra) clearly held that the High Court ought not to issue writs directing the State Government to promote the aggrieved officers with retrospective effect. The correct procedure for the High Court was to issue a writ to the State Government compelling it to perform its duty and to consider whether having regard to his seniority and fitness the 1st respondent should have been promoted on the relevant date and so what consequential benefits should be allowed to him. The Supreme Court in **P.N. Nanjundiah's** case (supra) observed as under: -

“As to the issuance of *mandamus* by the High Court, the High Court ought not to issue writs directing the State Government to promote the aggrieved officers with retrospective effect. The correct procedure for the High Court was to issue a writ to the State Government compelling it to perform its duty and to consider whether having regard to his seniority and fitness the 1st respondent should have been promoted on the relevant date and so what consequential benefits should be allowed to him.”

¹AIR 1968 SC 1113
²1969 (3) SCC 633

9. In a land mark decision of Justice V.R. Krishna Iyer in the matter of **State of Mysore v. C.R. Sheshadri and others**³, the Supreme Court has held that the power to promote an officer belongs to the Executive and the judicial power may control or review government action but cannot extend to acting as if it were the Executive and the judiciary cannot promote or demote officials. The Supreme Court observed as under: -

“... In our constitutional scheme, a broad three-fold division exists. The power to promote an officer belongs to the Executive and the judicial power may control or review government action but cannot extend to acting as if it were the Executive. The Court may issue directions but leave it to the Executive to carry it out. The judiciary cannot promote or demote officials but may demolish a bad order of Government or order reconsideration on correct principles. What has been done here is in excess of its jurisdiction. Assuming the petitioner's seniority over Venkataraman, how can the Court say that the former would have been for certain, promoted? Basically, it is in government's discretionary power, fairly exercised, to promote a government servant. If the rule of promotion is one of sheer seniority it may well be that promotion is a matter of course. On the other hand if seniority-cum-merit is the rule, as in the Supreme Court decisions cited before us, promotion is problematical. In the absence of positive proof of the relevant service rules, it is hazardous to assume that by efflux of time the petitioner would have spiralled up to Deputy Secretaryship. How could we speculate in retrospect what the rule was and whether the petitioner would have been selected on merit, and on the strength of such dubious hypothesis direct retro-active promotion and back pay? The frontiers of judicial power cannot be stretched thus far. The proper direction can only be that Government will reconsider the case of the petitioner afresh for purposes of notional promotion. If the service rule entitles him to promotion on the ground of seniority alone, Government will, except for the strongest reason, grant the benefit of promotion with effect from the date Venkataraman became Deputy Secretary. ...”

10. In the matter of **Government of Andhra Pradesh and others v. A.P. Jaiswal and others**⁴, the Supreme Court relying upon **P.N. Nanjundiah's** case (supra) held that court cannot issue mandamus to promote.

11. On the basis of principles of law laid down by the Supreme Court in the above-cited judgments (supra), if the facts of the present case are examined, it is quite vivid that the Labour Court could not have issued a straightway direction to promote respondent No.3 on the post of Sub-Fire Officer as respondent No.3 also appeared for the post of Sub-Fire Officer, but later on, only petitioner No.2 was found suitable and he was appointed on the post of Sub-Fire Officer and post of Sub-Fire Officer is reserved for direct recruitment. It is not the jurisdiction of the Labour Court to direct for promotion on a particular post as it is always discretion of the employer to consider and promote an officer on a particular post particularly when respondent No.3 at the relevant time was working on the post of Fireman and next promotional post is Leading Fireman and then the post of Sub-Fire Officer. Thus, the order passed by the Labour Court directing promotion of respondent No.3 straightway on the post Sub-Fire Officer w.e.f. November, 1980 is without jurisdiction and without authority of law.

12. Accordingly, the writ petition is allowed and the impugned order directing respondent-Municipal Corporation to post respondent No.3 on the post of Sub-Fire Officer w.e.f. November, 1980 and further directing to pay the difference amount of pay of

⁴ (2001) 1 SCC 748

Sub-Fire Officer is hereby set aside. However, respondent No.3 is at liberty to proceed in accordance with law. No cost(s).

Sd/-

(Sanjay K. Agrawal)

Judge

B/-